INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:	
Freedman v. *Maryland*, 380 U.S. 51	6
Manual Enterprises v. *Day*, 370 U.S. 478	7
"Memoirs" v. *Massachusetts*, 383 U.S. 413	9
Mishkin v. *New York*, 383 U.S. 502	8
Sarah, The, 8 Wheat. 391	11
United States v. *One Book Entitled "The Adventures of Father Silas"*, 249 F. Supp. 911	6, 7
United States v. *One Carton Positive Motion Picture Film*, 367 F. 2d 889	5, 6
United States v. *392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, affirmed, 373 F. 2d 633	5, 6, 7
Waring v. *Clarke*, 5 How. 441	11
Statutes and rule:	
19 U.S.C. 1305(a)	1, 2, 3, 4, 10
19 U.S.C. 1604	6
F.R. Civ. P., Rule 38(d)	11

265-801—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1394

POTOMAC NEWS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A13–A23) is reported at 373 F. 2d 635. The opinion of the district court (Pet. A3–A12) is reported at 253 F. Supp. 498.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1967. The petition for a writ of certiorari was filed on May 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the administrative and judicial scheme authorized by Congress in 19 U.S.C. 1305(a) for res-

olution of the question whether material sought to be imported into the United States is obscene, is unconstitutional either on its face or as applied in the instant case.

2. Whether the courts below properly found that the magazine sought to be imported was obscene.

3. Whether petitioner abandoned his preliminary demand for a jury trial.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided * * *.
>
> Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the

United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

On Friday, March 4, 1966, 56 cartons containing 19,500 copies of a magazine entitled "Hellenic Sun No. II," imported by petitioner from Denmark, arrived at the port of entry at Baltimore, Maryland. On Thursday, March 10, a draymen, under contract with the Customs' service, transported the cartons from the pier to the Bureau of Customs Appraisers' storehouse (Tr. 61-63).[1] The following day, "verifiers" completed their check of the number of maga-

[1] "Tr." refers to the transcript of the evidentiary hearing before the district court.

zines in each carton and informed the "Line Examiner" that the cartons were ready for his examination. At 8:45 a.m. on Monday, March 14, the next working day, the Line Examiner inspected the magazines and found them to be obscene (Tr. 101–102, 118). He referred them to the Assistant Collector of Customs at Baltimore. On March 16, the Assistant Collector informed the United States Attorney for the District of Maryland that the magazines had been seized as obscene (Tr. 103, 106–107). On March 17, the importer was notified of the seizure.[3]

On March 18, at about 9:00 a.m., the United States commenced a libel action for forfeiture of the magazines in the United States District Court for the District of Maryland. Later that same day, petitioner's attorney (who had not yet learned of the institution of the libel) filed a complaint in that same court seeking an injunction against the Bureau of Customs. The district judge denied petitioner's request for a temporary restraining order but issued a show-cause order returnable on April 7. On March 24, petitioner moved to dismiss the libel on the grounds that 19 U.S.C. 1305(a)—the federal statute authorizing the seizure—was unconstitutional and that the magazines were not obscene. The government thereupon filed a motion to dismiss the complaint for injunctive relief. On April 1, the cases were consolidated and an evidentiary hearing was held. On April 5, the district judge issued an opinion sustaining the constitutionality of

[3] On March 15 petitioner's attorney had telephoned the Assistant Collector of Customs to complain of the Bureau's delay in releasing the magazines (Tr. 119).

the statute, both generally and as applied in this case, and found the magazines obscene. On April 14 the court issued its formal order decreeing destruction of the magazines (Pet. A1–A2). The court of appeals affirmed (Pet. A–23).

ARGUMENT

1. There is no substance to petitioner's contention that the procedures adopted by Congress in 19 U.S.C. 1305(a) for determining the obscenity of material sought to be imported into this country violate the First Amendment prohibition against prior restraint. Nor is there any merit to petitioner's more particularized claim that these procedures, as applied in the instant case, resulted in an unconstitutional delay in resolving the obscenity issue.

a. The validity of initial detention of questionable material by Customs authorities is hardly open to question in light of the broad congressional power to regulate the importation of material and goods from foreign sources and the numerous regulatory purposes that detention serves. See, *e.g.*, *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 898 (C.A. 2); *United States* v. *392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490–491 (D. Md.), affirmed, 373 F. 2d 633 (C.A. 4).

The statutory authorization of administrative detention is merely for a temporary period, preliminary to a prompt judicial determination of the question whether the seized material is obscene. The seizure and forfeiture provisions of the statute are not rendered invalid because Congress did not fix exact time limits for

the implementation of the administrative and judicial proceedings. The statute provides, in terms, that "[u]pon the seizure" of a publication thought to be obscene, "the collector shall transmit information thereof to the district attorney of the district * * * who shall institute" forfeiture proceedings in the district court. Under a companion statute, 19 U.S.C. 1604, the United States Attorney is required to commence proceedings "without delay" for forfeiture of the material provided he believes it to be obscene. The statute thus contemplates swift administrative action (see *United States* v. *One Book Entitled "The Adventures of Father Silas"*, 249 F. Supp. 911, 918 (S.D. N.Y.); the *"Exclusive"* case, *supra*, 253 F. Supp. at 490–492) and consequent judicial dispatch consonant with a sound resolution of the question of obscenity (see *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d at 898–900). As pointed out by the Second Circuit in the *"491"* case (*id.* at 899), the legislative history of the statute, as well as its language, indicates that Congress intended that the issue of obscenity "'be quickly submitted to the district attorney and to the court for determination.' 72 Cong. Rec. 5422 (1930)." Similarly, see the *"Father Silas"* case, 249 F. Supp. at 916–918. In short, this Customs statute meets the requirement announced by this Court in *Freedman* v. *Maryland*, 380 U.S. 51, 59, that "[a]ny restraint imposed in advance of a final judicial determination on the merits must * * * be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; see also

Manual Enterprises v. Day, 370 U.S. 478, 514-515 (concurring opinion by Mr. Justice Brennan).

3. There was no unreasonable delay in implementing the statutory scheme in this case. Less than one month elapsed from the date of entry of the goods (March 4, 1966) to the judicial hearing on the merits (April 1, 1966). The final determination was made four days after the hearing. This is hardly an unreasonable delay in view of the sensitivity of the issue being resolved and the many different purposes for which imported goods must be examined. *United States v. 392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490-491 (D. Md.).

The sole period of apparently unjustified delay—two working days—was caused by the neglect of the drayman in transporting the magazines from the pier to the storehouse. Although required by the terms of his contract to perform this service in two days (Tr. 61-62, 72), in this instance the drayman took four.[1] But this short delay did not prejudice petitioner. The magazines are not dated and the passage of time would not affect their appeal nor render them "stale". As the district judge noted, although the magazine was

[1] The total period was six days (March 4-10), of which two were over a weekend. There was testimony that this was only the third time in two years that the drayman had failed to perform his services in time. Moreover, there is good reason to suppose that, in accord with the suggestion of both courts below, the Customs authorities at the port of Baltimore will take steps to prevent a repetition. The sensitivity to judicial criticism in this regard is evidenced by the prompt revamping of the administrative procedures following the ruling in the "Fuller Silks" case, 229 F. Supp. 911 (S.D.N.Y.) that prior administrative procedures were unduly time-consuming.

out of a series, it would not become obsolete or unsalable upon appearance of the following issue. (Pet. App. 7). Petitioner, moreover, did not inquire about the delay in Customs until March 15, the day before the Bureau completed its administrative examination. After this, the proceedings moved with considerable dispatch, culminating some two and a half weeks later in a judicial finding of obscenity.

The question of the obscenity of the materials was determined in strict accordance with the standards approved by this Court. The bulk of the publication (17 pages) contains photographs of nude males—in one instance a group of nude young boys—in outdoor surroundings. The focus of the pictures is most often the genital area. The remainder of the magazine consists of three articles (13 pages) entitled respectively "The Health Powers of Sunbathing," "Past and Present Nudist Cultures," and "Nudism Can Cure Delinquency." The late Dr. Manfred Guttmacher, formerly Chief Medical Officer of the Supreme Bench of Baltimore City, testified for the government at the hearing in the district court that the magazine has a prurient appeal for homosexual males and also, with respect to the one photograph of children, to a certain group of pedophiles (Tr. 32–33, 39, 41, 44). Petitioner introduced no evidence on these issues.

Based on Dr. Guttmacher's testimony and their own review of the magazine, both courts below found that the dominant appeal of the publication was to the prurient interests of a "clearly defined deviant sexual group" (*Roth v. New York*, 363 U.S. 302, 508);

that the magazine was "patently offensive" (*Memoirs v. Massachusetts*, 383 U.S. 413, 418), and that it was "utterly without redeeming social value" (*"Memoirs"*, 383 U.S. at 419). These determinations have a substantial basis. The male subjects of the photographs are not engaged in normal outdoor activities, but are shown in stationary, posed positions. As the court of appeals characterized the photographs, "[t]he camera's interest is languished upon the penis * * *" (Pet. A21).

The inclusion of articles on the history and benefits of nudism do not save the magazine from condemnation. While these articles are inoffensive and "not wholly unrelated" (Pet. A22) to the photographs, it is apparent that they are merely "fillers". As the court of appeals noted, they should not "obscure the fact that the magazine was designed and intended for the commercial exploitation of the prurient interest of male homosexuals" (Pet. A22-A23). This conclusion is underscored not only by the extremely high sales price ($5.00) of the publication (which actually costs the importer 24 cents), but also by the intended mode of advertisement of the magazines, as evidenced by the "catalogue of homosexual material" (as the district judge described it, Pet. A11) prepared by the prospective distributor.[4]

---

[4] Reference to this catalogue is also made earlier in the district court's opinion (Pet. A7), where the court noted that "[t]he importer and an associate company operate a selling service, whose 1968-69 catalogue consists of some 100 pages of advertising of homosexual books and magazines, its 'special interest field' * * *." We are lodging a copy of this catalogue with the Clerk of this Court. A copy of the magazine is already on file with the Clerk.

3. Section 1355(a) (*supra*, pp. 2-3) provides that "any party in interest" may demand a jury trial on "the facts at issue." Petitioner argues that he was denied that right although he demanded it in his answer to the government's libel filed on March 24, 1966.

This argument overlooks the course of events as they developed at the hearing before the district court. At the outset of the April 1 hearing petitioner's counsel was asked by the court: "Do you want to dispose of everything today?" Counsel replied: "There is no reason why not, your honor" (Tr. 3). Thereafter, the government put on its witnesses, including Dr. Guttmacher, who testified on the issue of obscenity of the magazine. The government's witnesses were subjected to cross-examination by petitioner's counsel (see *e.g.*, Tr. 33-60). Consistent with his then-expressed desire for a speedy judicial resolution, counsel for petitioner at no point objected to the continuation of the proceedings without a jury; nor did he renew his demand for a jury trial. At the close of the evidence, he argued the issue of obscenity before the judge (Tr. 134-137). Accordingly, even if not aware earlier in the proceedings on April 1, petitioner's counsel must have realized, when the government called Dr. Guttmacher to the stand and commenced its examination concerning the purient appeal of the magazine, that the hearing was not being restricted to the cross-motions to dismiss, but would also cover the question of obscenity (see Pet. App. A19-A20). By participating in the

proceedings without objection, counsel obviously chose to withdraw his original demand for a jury.[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.
Assistant Attorney General.
JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

JUNE 1967.

[1] Petitioner phrases his jury trial claim in this forfeiture action, instituted by a libel *in rem*, as though it were required by the Seventh Amendment (Pet. 9–11). This is a debatable proposition, however, since it has long been held that the Seventh Amendment does not require jury trials in admiralty cases (*e.g.*, *Waring* v. *Clarke*, 5 How. 441, 460), and would depend primarily on the characterization of the locus of the seizure as within or without admiralty jurisdiction (see *The Sarah*, 8 Wheat. 391, 394; *445 Cans of Egg Product* v. *United States*, 226 U.S. 172). In any event, even if petitioner had such a right, as pointed out above, his counsel effectively waived this right, whether constitutional or statutory, at the hearing before the district court. See F.R. Civ. P., Rule 38(d).